

NO.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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CHARLES LYNCH, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

**STATE'S
PETITION FOR DISCRETIONARY REVIEW**

FROM THE COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS
IN HOUSTON
NO. 01-17-00668-CR

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument should not be necessary to address the issues in this case. The law and the facts are not complicated. Nevertheless, if this Court wishes oral argument, the State will gladly participate.

NO.

**IN THE
COURT OF CRIMINAL APPEALS OF TEXAS**

**CHARLES LYNCH, Appellant
V.
THE STATE OF TEXAS, Appellee**

**From the Court of Appeals for the
First District of Texas
In Houston, Texas
No. 01-17-00668-CR**

STATE'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

Now comes Jack Roady, Criminal District Attorney for Galveston County, Texas,
and files this petition for discretionary review for the State of Texas.

<p>The one-volume Clerk's Record is referred to in the State's Brief as "C.R.page". The Reporter's Record is multiple volumes and is referred to as "R.R.volume number: page".</p>
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STATEMENT OF THE CASE

The State charged appellant, Charles Lynch, with committing the felony offense of possession of a controlled substance with the intent to deliver (C.R.5). In an enhancement paragraph, the State alleged that appellant was previously convicted of the felony offense of delivery of a controlled substance (C.R.5, 42). Appellant entered a plea of not guilty to the charged offense (C.R.50; R.R.2-14, 153) and a plea of true to the allegation in the enhancement paragraph (R.R.5-9). After the jury found appellant guilty as charged in the indictment (C.R.66, 68; R.R.4- 65), the trial court made a finding of true as to the allegations in the enhancement paragraph and assessed appellant's punishment at 45 years in prison (C.R.68; R.R.5-26-27). Appellant timely filed a written notice of appeal (C.R.75).

STATEMENT OF THE PROCEDURAL HISTORY

On October 13, 2020, in a published opinion, the First Court of Appeals held that the trial judge abused her discretion at the guilt/innocence stage of the trial by admitting into evidence two of the defendant's prior narcotics convictions. *Lynch v. State*, ___ S.W.3d ___, No. 01-17-00668-CR, 2020 WL 6038042 (Tex. App.—Houston [1st Dist.], Oct. 13, 2020, pet. filed). No motion for rehearing was filed. The State now timely files this petition for discretionary review.

GROUND FOR REVIEW

1. The court of appeals erred in holding the trial judge abused her discretion in admitting into evidence two of appellant's prior cocaine convictions in order to prove appellant's knowledge and/or intent with regard to the cocaine recovered in the charged offense, even after a defense witness claimed appellant had no knowledge or intent to commit the charged offense (R.R.3-226-30; R.R.4-5-32, 37, 61-62; C.R.63-64).
2. The court of appeals erred in holding that, upon introducing a defendant's prior narcotics convictions into evidence in order to prove a defendant's knowledge and/or intent in his current narcotics prosecution, the State must also show the facts or details of the prior narcotics cases in order to show their similarity to the charged offense (R.R.3-226-30; R.R.4-5-32, 37, 61-62; C.R.63-64).
3. The court of appeals erred in holding appellant's substantial rights were adversely affected, for the purposes of TEX. R. APP. P. 44.2(b), merely because the purported error occurred—and nothing more (R.R.3-226-30; R.R.4-5-32, 37, 61-62; C.R.63-64).

FIRST AND SECOND GROUNDS FOR REVIEW

- 1. The court of appeals erred in holding the trial judge abused her discretion in admitting into evidence two of appellant's prior cocaine convictions in order to prove appellant's knowledge and/or intent with regard to the cocaine recovered in the charged offense, even after a defense witness claimed appellant had no knowledge or intent to commit the charged offense.**
- 2. The court of appeals erred in holding that, upon introducing a defendant's prior narcotics convictions into evidence in order to prove a defendant's knowledge and/or intent in his current narcotics prosecution, the State must also show the facts or details of the prior narcotics cases in order to show their similarity to the charged offense.**

ARGUMENT AND AUTHORITIES

Officers went to appellant's residence in order to execute a narcotics search warrant and an arrest warrant for appellant (R.R.3-21-23). The search of appellant's residence revealed a dresser contained several pieces of what appeared to be cocaine (R.R.3-29, 44-48; State's Exhibits #15, #16, #17, #18, #24, #25). The total amount of the substance was more than a single user would possess (R.R.3-59, 63). The substance was later confirmed to be 4.75 grams of cocaine (R.R.3-144-45; State's Exhibit #58).

At the time, there were four occupants of the residence—appellant, Tina Moreno, Phillip Darden, and Norma Myers (R.R.3-23-24, 42-43). Based upon

months of surveillance, and the evidence uncovered at the residence, the officers believed appellant was the sole resident (R.R.3-24-25, 44, 49-53, 71-72, 81, 114-15). However, appellant told the officers all four people in the residence lived at the residence (R.R.3-25, 110-11), and everyone else told the officers appellant and Moreno lived at the residence (R.R.3-71-72, 121).

Moreno was interviewed at the scene (R.R.3-95; Defendant's Exhibit #2); she claimed to live at the residence, and all of the cocaine in the residence was hers (R.R.3-73, 101; Defendant's Exhibit #2 at 1:25, 1:35, 4:07). Moreno briefly changed her story when the officers confirmed her connection to the cocaine was not going to prevent appellant from being arrested (R.R.3-104-05, 117; Defendant's Exhibit #2 at 6:35, 7:10, 7:12, 7:46, 7:58, 8:35).

The defense presented a short affidavit from Moreno in which she claimed appellant had no knowledge of the cocaine, and all of the cocaine belonged to her (R.R.3-156-57; Defendant's Exhibit #4). The defense presented a second longer affidavit from Moreno, in which she claimed (1) she lived at appellant's residence, (2) she purchased the cocaine found in the residence, (3) appellant was unaware of the cocaine, and (4) she lied in briefly attempting to blame appellant for the cocaine (R.R.3-160-62; Defendant's Exhibit #3).

The defense also called Moreno as a witness, and she testified she lived at appellant's residence (R.R.3-157, 183-84), she purchased a quarter ounce of cocaine

(R.R.3-169-70, 172), the cocaine in the residence belonged to her (R.R.3-153, 207-10, 224), the cocaine in the residence did not belong to appellant (R.R.3-158, 162-63), appellant had no knowledge of the cocaine (R.R.3-153, 225), and appellant did not approve of cocaine (R.R.3-153-54, 179).

After the defense rested (R.R.3-226), the State offered State's Exhibit #60 into evidence, and the trial court admitted the exhibit (R.R.4-29-30). State's Exhibit #60 comprised the following documents:

- Judgment dated July 19, 2006 for the offense of Possession of a Controlled Substance to wit: Cocaine 4-200 grams with Intent to Deliver, with the date of the offense being December 9, 2004, and for which appellant was sentenced to 10 years in prison
- The underlying indictment
- Judgment dated July 19, 2006 for the offense of Possession of a Controlled Substance, to wit: Cocaine 4-200 grams with Intent to Deliver, with the date of the offense being February 9, 2006, and for which appellant was sentenced to 10 years in prison
- The underlying indictment

The trial prosecutor stated the State was offering this exhibit into evidence for the following reasons:

- (1) to rebut appellant's theory he did not know about the cocaine,

- (2) to show evidence of appellant's intent to possess and deliver the cocaine,
- (3) to show evidence of the absence of any mistake on appellant's part, and
- (4) under the "doctrine of chances"

(R.R.3-227-28; R.R.4-5-6).

After the exhibit was admitted into evidence, the trial court provided the following limiting instruction to the jurors:

[L]adies and gentlemen, just so you know, that evidence was offered by the State as rebuttal evidence to the Defendant's defensive theory of this case. This evidence may only be considered to show, if it does, the Defendant's intent, motive, opportunity, preparation, plan, absence of mistake or accident, or knowledge, if any.

You may not consider this evidence unless you find and believe beyond a reasonable doubt that the Defendant committed these other acts, if any were committed. **This evidence may not be considered as character evidence of the Defendant; and it may not be used as evidence that on this particular occasion, the Defendant acted in accordance with that alleged character trait, if any.**

(R.R.4-31-32) (emphasis added). In the final charge to the jury, the trial court also instructed the jurors:

The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. This evidence was admitted only for the purpose of assisting you, if it does, for the purpose of showing the defendant's motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident, if any. You cannot consider the testimony unless you find and believe beyond a reasonable doubt that the Defendant committed these acts, if any, were committed.

(C.R.63-64).

Contrary to what the court of appeals suggested, the State never offered appellant's two prior cocaine convictions merely to impeach or correct a false impression created by Moreno's evidence. *Cf. Lynch*, 2020 WL 6038042, at *5. The court of appeals suggested the only manner in which the State could introduce appellant's two prior cocaine convictions was during its cross-examination of Moreno. *Id.* (“the opponent must correct the ‘false impression’ through cross-examination of the witness who left the false impression, *not* by calling other witnesses to correct the false impression.”) (citing *Wheeler v. State*, 67 S.W.3d 879, 885 (Tex. Crim. App. 2002)). This portion of *Wheeler* dealt with the State's introduction of extraneous offenses (1) in order to challenge the basis of a defense expert's opinion and (2) in order to challenge the expert's opinion regarding the defendant's character. The State does not believe this portion of *Wheeler* was intended to be a general explanation of the limits for correcting a witness's false impression.

Courts generally prohibit a party from using extrinsic evidence to impeach a witness **on a collateral issue**. However, if the witness's testimony created a false impression directly relevant to the offense charged—such as the defendant's knowledge or intent as to the charged offense—the opposing party would be permitted to delve into the issue beyond the limits of cross examination. *Hayden v. State*, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009). If the State offered appellant's two prior cocaine convictions merely because the defense “opened the door” through

Moreno's testimony, the State would not be restricted to cross-examining Moreno about appellant's prior convictions. The State could offer those prior convictions in rebuttal. *Daggett v. State*, 187 S.W.3d 444, 453-54 (Tex. Crim. App. 2005).

The manner in which the court of appeals discussed *Wheeler* leads one to believe that it is dicta; therefore, the State has not raised a separate ground for review with regard to that portion of the opinion by the court of appeals. But the discussion is a part of the court's erroneous application of TEX. R. EVID. 403, TEX. R. EVID. 404(b), and TEX. R. APP. P. 44.2(b). If this Court does not view this portion of the opinion by the court of appeals as dicta, it should be considered as a separate ground for review. See TEX. R. APP. P. 66.3(c), 66.3(d) ("court of appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals" and "court of appeals . . . appears to have misconstrued a statute, rule, regulation, or ordinance").

The court of appeals erred in repeatedly holding that, upon introducing appellant's two prior cocaine convictions into evidence, the State had to present the details of those two prior convictions in order to show their similarity to the facts and details of the charged offense. See *Lynch*, 2020 WL 6038042, at *5 ("the State did not introduce any associated testimony or details to demonstrate similarity between the circumstances of the prior convictions and the facts of the alleged offense."); *Id.* at *6 ("the admission of pen packets stating only the two convictions, standing alone and

without context, is unusually prejudicial.”); *Id.* at *8 (“Introducing the convictions, without details that would give the jury perspective as to whether they were similar to this situation or not, served little purpose other than to prove character conformity.”).

The details of appellant’s prior cocaine convictions would be more prejudicial to appellant than merely introducing the two prior judgments and indictments. Yet that is precisely what the court of appeals held. What took only a few seconds of the trial in this case would take an additional day or more of the trial court’s time, as the State presented the facts of appellant’s prior convictions. Inexplicably, the court of appeals wanted the State present additional extraneous offenses in order to help the State prove appellant’s knowledge and intent.

For example, the court of appeals wanted the State introduce evidence of “trash pulls” or “controlled buys” at appellant’s residence in order to help prove its case, apparently not recognizing this testimony would constitute extraneous-offense evidence, which appellant certainly would challenge. *See id.* at *6. If this is the law in this state, it certainly should be a holding issued by this Court. The defense bar should be prepared for numerous additional extraneous offenses to be presented in narcotics cases, and trial courts and juries should be prepared for much lengthier trials as the State presents all of the numerous extraneous offenses committed by the typical narcotics defendant in order to help prove the defendant’s knowledge or intent.

In support of its holding that, in a narcotics case, the State should prove the

details of the defendant's prior narcotics cases in order to show their similarity to the charged offense, the court of appeals cited to several victim-oriented decisions, in which the issues of intent and knowledge are very different from those issues in a narcotics case. *See id.* at *5-6 (citing *Ford v. State*, 484 S.W.2d 727, 730 (Tex. Crim. App. 1972) (pre-rules murder case); *Smith v. State*, 420 S.W.3d 207, 220-22 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (murder); *Prince v. State*, 192 S.W.3d 49, 54-55 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (capital murder); *Johnson v. State*, 932 S.W.2d 296, 302-03 (Tex. App.—Austin 1996, pet. ref'd) (capital murder); *Blackwell v. State*, 193 S.W.3d 1, 14 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (indecent with a child); *Plante v. State*, 692 S.W.2d 487, 491 (Tex. Crim. App. 1985) (theft)).

This litany of cases does not appear to support the proposition advanced by the court appeals. For example, in *Smith v. State*, the court of appeals noted that, when extraneous-offense evidence is offered on the issue of intent (as opposed to identity), Texas courts hold there is less need to show significant similarity between the facts of the other incidents and those of the case being tried. *Smith*, 420 S.W.3d at 221 (citing *Johnson*, 932 S.W.2d at 302-03). The degree of similarity simply need not be as great if offered to prove the issue of intent. *Smith*, 420 S.W.3d at 221 (citing *Bishop v. State*, 869 S.W.2d 342, 346 (Tex. Crim. App. 1993); *Morrow v. State*, 735 S.W.2d 907, 909-10 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd)).

In contrast to the cases relied upon by the court of appeals, the State referred the trial judge and the court of appeals to several narcotics decisions in support of its assertion that appellant's two prior cocaine convictions were admissible to help prove appellant's knowledge and/or intent as to the charged offense (R.R.3-229). For example, in *Le v. State*, a marijuana-possession case, the defendant vigorously challenged whether he knowingly or intentionally possessed the marijuana. Therefore, the State introduced officer testimony regarding two of the defendant's prior marijuana cases, and it introduced a judgment and sentence for a third marijuana-possession offense. *Le v. State*, 479 S.W.3d 462, 468-70 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

In *Le*, the State introduced the evidence for the purpose of rebutting the defendant's position he lacked the requisite intent or knowledge required for conviction. *Id.* at 470. The evidence the defendant previously possessed marijuana was circumstantial evidence he intentionally or knowingly possessed it on the date of the charged offense. It therefore had relevance beyond the question of character conformity and was admissible to rebut the defensive theory the defendant did not have the requisite knowledge or intent. *Le*, 479 S.W.3d at 471.

In *Le*, the court of appeals recognized evidence of this nature might impress the jury based on an impermissible inference of character conformity. Thus, the trial judge instructed the jury, both when the extraneous-offense evidence was introduced

and again in the final jury charge, that it could not consider such evidence for any purpose except for the purpose of determining the defendant's knowledge or intent as to the charged offense. *Le*, 479 S.W.3d at 471-72.

Both at trial and on appeal, the State relied prominently upon *Le*. Nevertheless, the court of appeals failed to discuss *Le* and only cited it as possible contrary authority. *See Lynch*, 2020 WL 6038042, at *7. Just as in *Le*, the State in this case offered the defendant's prior narcotics record to help prove appellant's knowledge and/or intent. Just as in *Le*, the trial judge in this case instructed the jury both when the first extraneous-offense evidence was introduced and again in the final jury charge that the jury could not consider such evidence for any purpose except in determining the defendant's knowledge or intent as to the charged offense. *Le*, 479 S.W.3d at 471-72.

In this case, the trial judge's first jury instruction specifically informed the jurors they could not consider the two prior narcotics cases as "character evidence of the Defendant," and the two prior narcotics cases could not be considered for the proposition that "the Defendant acted in accordance with that alleged character trait, if any." (R.R.4-31-32). Inexplicably, the court of appeals considered the trial court's two jury instructions as factors **against** the admissibility of the two prior narcotics cases—despite the above-quoted language—because the jury instructions allowed the jurors to consider the two prior narcotics cases for reasons not applicable to this case,

such as motive, opportunity, preparation, or plan. *See Lynch*, 2020 WL 6038042, at *7.

In *Blackwell v. State*, just as in this case, the trial court instructed the jurors to consider the extraneous offenses for several permissible reasons set forth in TEX. R. EVID. 404(b), and not just the reasons proffered as the basis for the admissibility of those extraneous offenses. *Blackwell*, 193 S.W.3d at 15. The court of appeals held the trial court's instruction to the jurors to consider the extraneous offenses for non-applicable reasons

amounted to surplusage that the jury could readily disregard because those issues were not pertinent to the trial. The charge specifically limited the extraneous offense evidence to issues other than character conformity. Therefore, although not as narrowly tailored to the specific issues involved as it could have been, the charge correctly instructed the jury to limit its use of the extraneous offense evidence to issues that were properly before it . . .

Blackwell, 193 S.W.3d at 15-16. Just as in *Blackwell*, the jury instructions in this case “by implication instructed [the jury] not to consider the extraneous-offense evidence as substantive evidence of the defendant’s guilt.” *Id.* at 16. In its opinion, the court of appeals cited *Blackwell*, but the court of appeals did not reference this aspect of the *Blackwell* decision. *Lynch*, 2020 WL 6038042, at *6.

The trial judge’s limiting instructions about the two prior narcotics cases minimized any risk the jury would consider the convictions for any improper purpose or give them undue weight. *Harris v. State*, 572 S.W.3d 325, 334 (Tex. App.—Austin 2019, no pet.) (citing *Taylor v. State*, 332 S.W.3d 483, 492 (Tex. Crim. App. 2011) (jury

is presumed to understand and follow trial court's jury-charge instructions absent evidence to contrary); *Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996) (impermissible inference of character conformity can be minimized through limiting instruction)). See TEX. R. APP. P. 66.3(a), 66.3(c) ("court of appeals' decision conflicts with another court of appeals' decision on the same issue" and "court of appeals has decided an important question of state . . . law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals").

In its brief on direct appeal, the State referred the court of appeals to several other decisions in support of its argument, none of which were discussed by the court of appeals:

- *Shedden v. State*, 268 S.W.3d 717, 738-39 (Tex. App.—Corpus Christi 2008, pet. ref'd) (witnesses were properly permitted to testify they purchased drugs from defendant in rebuttal to defensive theory that drugs belonged to co-defendant and defendant was unaware of drugs).
- *Wingfield v. State*, 197 S.W.3d 922, 925-26 (Tex. App.—Dallas 2006, no pet.) (in marijuana-possession prosecution, evidence defendant used marijuana in past was circumstantial evidence defendant knowingly or intentionally possessed marijuana on date in question, and it was admissible to rebut defensive theory defendant had no knowledge or intent).
- *Swarb v. State*, 125 S.W.3d 672, 683-84 (Tex. App.—Houston [1st Dist.] 2003,

pet. dism'd) (evidence of defendant's two prior narcotics convictions was admissible under Rule 403 because evidence made defendant's intent and knowledge of methamphetamine in his truck more probable, and it rebutted defendant's evidence of lack of intent and knowledge).

- *Caballero v. State*, 881 S.W.2d 745, 748 (Tex. App.—Houston [14th Dist.] 1994, no pet.) (defendant's prior cocaine-possession conviction was some evidence from which jury could infer defendant knew there was cocaine residue in crack pipe).
- *Kemp v. State*, 861 S.W.2d 44, 46 (Tex. App.—Houston [14th Dist.] 1993, no pet.) (defendant's prior narcotics convictions were admissible as substantive evidence defendant knowingly possessed cocaine).
- *Payton v. State*, 830 S.W.2d 722, 730 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (defendant's previous sale of cocaine was admissible to prove defendant's charged possession of controlled substance was made with intent to deliver).

Numerous other decisions from the courts of appeals also support the admissibility of appellant's two prior cocaine convictions to show his knowledge and intent in the charged offense:

- *Mason v. State*, 99 S.W.3d 652, 655-56 (Tex. App.—Eastland 2003, pet. ref'd) (citing *Powell v. State*, 5 S.W.3d 369, 383 (Tex. App.—Texarkana 1999, pet. ref'd) (conduct occurring after charged offense was used to show defendant

knew substance was illegal));

- *Dade v. State*, 956 S.W.2d 75, 79-80 (Tex. App.—Tyler 1997, pet. ref'd) (defendant's prior arrest for marijuana possession was admissible to show defendant was aware of marijuana in charged offense);
- *Chavez v. State*, 866 S.W.2d 62, 65 (Tex. App.—Amarillo 1993, pet. ref'd) (defendant's prior drug deals had tendency to make it more probable that he aided, assisted or promoted transaction in question);
- *Patterson v. State*, 723 S.W.2d 308, 313 (Tex. App.—Austin 1987), *aff'd and remanded on other grounds*, 769 S.W.2d 938 (Tex. Crim. App. 1989) (knowledge is essential element of crime of narcotics possession; evidence of defendant's previous drug use and possession was relevant);
- *Howard v. State*, 713 S.W.2d 414, 416 (Tex. App.—Fort Worth 1986), *pet. ref'd per curiam*, 789 S.W.2d 280 (Tex. Crim. App. 1988) (defendant's prior drug sales were admissible, and extraneous offenses were admissible to prove intent and knowledge, which were contested by defendant).

The court of appeals made no attempt to explain or distinguish the cases cited by the State both at trial and on direct appeal. The opinion of the court of appeals is directly contrary to all of these decisions cited above. *See* TEX. R. APP. P. 66.3(a), 66.3(f) (“court of appeals’ decision conflicts with another court of appeals’ decision on the same issue” and “court of appeals has so far departed from the accepted and usual

course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision").

This Court should likewise hold a defendant's prior narcotics activity is admissible to prove the defendant's knowledge and intent in a narcotics case, especially when the defendant's knowledge and intent is disputed by the defense.

That is precisely what the trial prosecutor argued in her final argument to the jury:

Y'all, [Moreno's various stories are] not reasonable; and I'm sure you're asking yourself, "Well, if the Judge gave me those instructions on how I can't use it, why – the previous convictions on Mr. Lynch – why did the State bring me that?"

Well, the reason why I entered that was because Moreno gets on the stand and pretty much says, "Hey, I ran this whole operation under his nose. **He had no knowledge, no intent. He wouldn't go for that. Pretty much, he's a saint. He doesn't want any of that in his house.**"

So to rebut that, I brought you: Well, he's not above having cocaine in his possession; and, in fact, cocaine, with possession and the intent to deliver. The same exact reason why we're here today.

But Defense counsel wants you to believe that, "No, he's just a saint. He would never have that going on."

(R.R.4-61-62) (emphasis added). Contrary to that stated by the court of appeals, the trial prosecutor was not arguing the jurors should find appellant guilty of the charged offense because he was convicted of that offense on two occasions in the past. *Cf. Lynch*, 2020 WL 6038042, at *7. The trial prosecutor was clearly arguing the jurors should consider appellant's two prior cocaine convictions as rebuttal to Moreno's

evidence appellant had no knowledge or intent to commit the charged offense.

The court of appeals erred in holding the trial judge abused her discretion in admitting into evidence two of appellant's prior cocaine convictions in order to prove appellant's knowledge and/or intent with regard to the cocaine recovered in the charged offense, especially because Moreno claimed appellant had no knowledge or intent to commit the charged offense. The court of appeals erred in holding that, upon introducing a defendant's prior narcotics convictions into evidence in order to prove a defendant's knowledge and/or intent in his current narcotics prosecution, the State must also show the details of the prior narcotics cases in order to show their similarity to the charged offense. This Court should grant the State's petition for discretionary review on the State's first and second grounds for review.

THIRD GROUND FOR REVIEW

3. The court of appeals erred in holding appellant's substantial rights were adversely affected, for the purposes of TEX. R. APP. P. 44.2(b), merely because the purported error occurred—and nothing more.

In this case, the court of appeals held, "The strongest piece of evidence the State had against Lynch was that he had previously been convicted under similar statutes on two occasions." *Lynch*, 2020 WL 6038042, at *9. That holding is not

supported by the record. The strongest evidence the State had against appellant was the several grams of cocaine on appellant's dresser (R.R.3-29, 44-48, 59, 63, 144-45). The jury did not convict appellant because the State introduced State's Exhibit #60 into evidence and briefly mentioned the exhibit in a couple of paragraphs of the State's final jury argument that comprised several pages of the reporter's record.

The biggest problem with the harm analysis by the court of appeals is the court did nothing more than repeat its holdings on the merits:

- “the character of the erroneously admitted evidence was especially prejudicial.” *Id.* at *9.
- “The pen packets were official documents, leaving little room for interpretation by the jury.” *Id.* at *9.
- “The State's argument gave the jury the impression they could convict Lynch of being a drug dealer, generally.” *Id.* at *9.
- “Given that the extraneous-offense evidence was inherently prejudicial and possessed low probative value, and considering the record as a whole and the State's emphasis on the extraneous offense in closing argument, it **appears** the offenses were presented to improperly bolster the State's case.” *Id.* at *9 (emphasis added).

These quoted statements are the bulk of the harm analysis employed by the court of appeals. The court of appeals did nothing more than emphasize the holdings it

reached in addressing the merits. That is not a harm analysis.

In conducting a harm analysis under TEX. R. APP. P. 44.2(b), an appellate court should consider: (1) the character of the alleged error and how it might be considered in connection with other evidence; (2) the nature of the evidence supporting the verdict; (3) the existence and degree of additional evidence indicating guilt; and (4) whether the State emphasized the complained of error. *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018). The court of appeals did not apply any of these factors, except perhaps the last one—and, as noted above, incorrectly (R.R.4-61-62). *See also Davis v. State*, 581 S.W.3d 885, 894 (Tex. App.—Dallas 2019, pet. ref'd) (broad limiting instruction was sufficient to prevent the defendant from being harmed); *James v. State*, 555 S.W.3d 254, 262 (Tex. App.—Texarkana 2018, pet. dism'd) (brief portion of prosecutor's final argument was not sufficient to harm defendant).

The court of appeals erred in holding appellant's substantial rights were adversely affected, for the purposes of TEX. R. APP. P. 44.2(b), merely because the purported error occurred—and nothing more. *See* TEX. R. APP. P. 66.3(c), 66.3(d), 66.3(f) (“court of appeals has decided an important question of state . . . law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals” and “court of appeals has . . . misconstrued a . . . rule” and “court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of

Criminal Appeals’ power of supervision.”). This Court should grant the State’s petition for discretionary on the State’s third ground for review.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the State prays that this Court will grant the State's petition for discretionary review, reverse the judgment of the court of appeals, and remand the case to the court of appeals for consideration of appellant's unaddressed issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Attorney for the State certifies a copy of the foregoing brief was sent via email, eFile service, to Joel Bennett, attorney for Charles Lynch, at joel@searsandbennett.com, on November 12, 2020.

/s/ Alan Curry
ALAN CURRY
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CERTIFICATE OF COMPLIANCE

The undersigned Attorney for the State certifies this brief is computer generated, and consists of 4,488 words.

/s/ Alan Curry
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Assistant Criminal District Attorney
Galveston County, Texas

APPENDIX

2020 WL 6038042

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS. UNTIL RELEASED,
IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas, Houston (1st Dist.).

Charles LYNCH, Appellant
v.
The STATE of Texas, Appellee

NO. 01-17-00668-CR

|
Opinion issued October 13, 2020

Synopsis

Background: Defendant was convicted in the 405th District Court, Galveston County, of possession with intent to deliver between four and 200 grams of cocaine, and sentenced to 45 years' imprisonment. Defendant appealed.

Holdings: The Court of Appeals, [Kelly](#), J., held that:

probative value of pen packets showing defendant's past convictions was substantially outweighed by danger of unfair prejudice, and

trial court's error of admitting pen packets was not harmless.

Reversed and remanded.

On Appeal from the 405th District Court, Galveston County, Texas, Trial Court Case No. 15-CR-3172

Attorneys and Law Firms

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Panel consists of Justices [Keyes](#), [Lloyd](#), and [Kelly](#).

OPINION

[Peter Kelly](#), Justice

*1 Charles Lynch appeals his conviction for possession with intent to deliver between 4 and 200 grams of cocaine, for which he was sentenced to 45 years' imprisonment. *See* [Tex. Health & Safety Code §§ 481.102\(3\)\(D\), 481.112\(a\), \(d\)](#). In four issues, he contends that the trial court abused its discretion by admitting two extraneous offenses in the form of penitentiary packets and by admitting hearsay testimony regarding who lived in the house where a search warrant was executed. We hold that the trial court abused its discretion in admitting the extraneous offenses because they were more prejudicial than probative. Because the error affected Lynch's substantial rights, we reverse the judgment and remand to the trial court.

Background

Lynch was indicted for possession with intent to deliver between 4 and 200 grams of cocaine. He pleaded not guilty and proceeded to a jury trial. At trial, the State called three witnesses: (1) the police officer who executed a search warrant, (2) a detective who attempted to obtain cell phone data from Lynch's phone, and (3) a chemist who tested the drugs recovered at the scene. Lynch called one witness, Tina Moreno, another occupant of the house.

Sergeant F. Gandy of the La Marque Police Department testified that he conducted a narcotics investigation that focused on Lynch as a suspect. Sergeant Gandy obtained a search warrant for Lynch's residence and an arrest warrant for Lynch. In September 2015, officers went to Lynch's residence to execute the warrants. The residence was a garage that had been converted into a one-bedroom apartment. Police forced their way in after nobody answered the door. Officers discovered four occupants inside the house: Lynch, Moreno, Phillip Darden, and

Norma Myers. Sergeant Gandy believed that Lynch was the only permanent resident of the house and the other occupants “visited in some form or fashion.” Lynch told Sergeant Gandy that all four occupants had access to the house and lived there. Sergeant Gandy discovered crack cocaine on a dresser in the bedroom, some of which was resting on a cell phone. He also found a knife and cash on a dresser and plastic baggies with the corners torn off in the trash can. Sergeant Gandy testified that about 7 grams of crack cocaine was found, which was close to a quarter of an ounce. The State showed the jury photos that law enforcement took of the apartment and their discoveries.

On cross-examination, Sergeant Gandy testified that some of the evidence had been moved before it was photographed. For example, plastic baggies were placed on top of the stove in the kitchen and on top of the dresser in the bedroom to facilitate photographs, but the baggies were not in those positions when the officers arrived. Sergeant Gandy also clarified that all four occupants said that Moreno lived in the house with Lynch. Moreno’s prescription medicine was found in the bedroom. Sergeant Gandy agreed that a pink bottle of Hello Kitty perfume found in the bathroom likely belonged to a woman. He declined to speculate about whether other products in the bathroom and shower belonged to a woman or a man. Sergeant Gandy admitted that, while Moreno stated that the drugs were hers, she was not arrested or investigated beyond searching her cellphone. According to the State’s photographs, her cellphone was found plugged into a pink phone charger next to the bed.

*2 While Sergeant Gandy was testifying, the defense played a recording of his interview with Moreno. The interview occurred immediately after the search warrant was executed and took place in the living room. During the interview, Moreno told the officers that she had lived at the house for a few months. She stated that the drugs in the bedroom belonged to her and that she sold and used crack cocaine. She claimed to have a “quarter” of cocaine that she valued at approximately \$225. Once the officers told her that claiming that the drugs were hers would not prevent Lynch from being arrested and that she could be charged with a first-degree felony, Moreno said that the drugs were not hers. She said that she initially said the drugs belonged to her because she did not want Lynch to be arrested. Moreno also denied selling drugs from the residence. She told officers that the cell phone on top of the dresser belonged to Lynch and that she had seen him sell drugs from the house in the past. Sergeant Gandy testified that, even though Moreno claimed the drugs were hers, she was not arrested because he did not believe her. He did not think she demonstrated enough knowledge to be a street-level drug dealer, and he had not seen her at the house during surveillance.

Detective G. Groce of the Galveston Police Department, whose specialty was extracting information from cell phones and computers, testified that he attempted to extract information from Lynch’s phone but could not do so because it was password protected. He was able to extract information from Moreno’s phone.

A chemist with the Department of Public Safety testified that he tested the suspected controlled substance found on the scene. The sample he tested weighed more than four grams, and since the highest penalties attach to drug weights over four grams, he did not test all of the substance recovered to find the total weight. He determined that the substance was cocaine. The State rested after the chemist’s testimony.

Lynch called Tina Moreno to testify. Moreno said that she was called to testify because drugs found in the house belonged to her. She stated that Lynch did not know about the drugs, nor did he know that she was using and selling them. Moreno testified that Lynch would not approve of her using drugs in the house. She testified that the crack cocaine, plastic baggies, and knife found in the house belonged to her.

Moreno read an affidavit that she swore to on the day after the search. In the affidavit, she stated that all of the controlled substances in the house belonged to her. When she wrote the affidavit, she did so on her own, without counsel. While testifying, she stated that she was lying when she told police on the day of the search that the drugs were not hers. She testified that officers intimidated her when they told her she would go to jail and scared her into saying that the drugs were Lynch’s when they were not. She wrote the affidavit the next day to clear up the confusion.

Moreno also read a second affidavit that she had signed. It stated that she had lived at the house for a few months, and she had used cocaine for several years. On the day of the search, she purchased some cocaine and brought it to the house. Lynch did not know about the purchase because she had led him to believe that she no longer used crack cocaine. In the affidavit, she stated that she shared a bedroom with Lynch, and when she went into the bedroom to change her clothes, she placed her belongings on the dresser, including the crack cocaine. She meant to pick up her things, including the cocaine, but it slipped her mind. She averred that the coin purse found on the dresser and its belongings, which were little bags of crack cocaine, a \$20 bill, and a \$10 bill, belonged to her. Moreno testified that her statements in the affidavit were true. She also testified that she had criminal convictions stemming from her history of drug use.

On cross-examination, Moreno stated that she had been released from prison in June of 2015, and between June and September, when the house was searched, she stole to get money to buy drugs. On the day before the search she had purchased a quarter of an ounce of crack cocaine for \$225 from a house in La Marque. She intended to smoke it at the house while Lynch was gone. She also had smaller amounts of cocaine in a pouch. Moreno testified that while her primary mailing address was her mother's house, she went back and forth between Lynch's house and her mother's house. She kept clothes at Lynch's house and spent about 30 percent of her time there.

***3** The State introduced text conversations between Lynch and Moreno that occurred a few weeks before the search. They showed that Moreno texted Lynch asking him to bring her "something to smoke." Moreno testified that she was asking Lynch to bring her cigarettes because she did not have money to buy them. She also texted Lynch in early September, thanking him for all that he had done for her and apologizing for "the way things turned out" between them. She told Lynch that she loved him but that she was "in her addiction." She testified that she meant her addiction to crack cocaine and cigarettes. After Moreno's testimony, Lynch rested.

The State then sought to introduce rebuttal evidence, in the form of penitentiary packets ("pen" packets), showing that Lynch had four prior convictions: possession of methamphetamine in 1990, two convictions for possession with intent to deliver cocaine in 2006, and possession of cocaine in 2006. The State argued that Moreno's testimony had rebutted all of the State's evidence of Lynch's intent because Moreno stated that the crack cocaine, knife, and baggies belonged to her. Lynch responded that the convictions were not evidence of intent because there was no testimony or evidence to show a distinctive, common characteristic between the previous cases and the underlying allegations. Pen packets did not prove that Lynch had similar motive, means, or intent. Lynch argued that without direct testimony or some other evidence, the extraneous offenses were more prejudicial than probative, allowing the jury to convict based on bad character. Lynch also argued that the possession cases were not sufficiently similar because the underlying offenses did not have the same elements as the charged offense.

The court allowed the State to introduce the two convictions for possession of a controlled substance with intent to deliver between 4 and 200 grams of cocaine from 2006 and excluded the other two convictions. The pen packets containing the two convictions were admitted and published to the jury. The court instructed the jury that

they could use them as rebuttal evidence to Lynch's defensive theory and could consider them to show Lynch's "intent, motive, opportunity, preparation, plan, absence of mistake or accident, or knowledge, if any."

The jury found Lynch guilty of possession with intent to deliver cocaine. He pleaded true to an enhancement, and the court sentenced him to 45 years' imprisonment.

Extraneous Offenses

In two issues, Lynch contends that the trial court abused its discretion in admitting evidence of his two prior convictions for possession with intent to deliver. He argues that the pen packets did not include details demonstrating their similarity to the underlying case, allowing the jury to convict based on bad character. He also argues that without detail, the probative value of the convictions was substantially outweighed by their unfair prejudicial effect. We agree.

A. Background

The State introduced the extraneous offense evidence through pen packets, containing only the judgments and indictments for the two offenses. The indictment language tracked the statutory language for the offenses and did not offer particular details of the underlying conduct. The State sought to admit the convictions to rebut Moreno's testimony that the drugs belonged to her. Specifically, the State argued that the convictions showed intent and absence of mistake. Lynch objected that the State could not use the convictions to show conformity, that they were too remote from the underlying case, and that their probative value was outweighed by their prejudicial effect. He also objected that the evidence lacked detail showing similar characteristics between the present case and the prior cases. Over Lynch's objections, the court allowed the two convictions in the form of pen packets to be introduced.

***4** When the State introduced the pen packets, the court instructed the jury that the convictions were offered "as rebuttal evidence to the Defendant's defensive theory of this case. This evidence may only be considered to show, if it does, the Defendant's intent, motive, opportunity, preparation, plan, absence of mistake or accident, or knowledge, if any." The court instructed that the evidence

could not be considered as character evidence and or used as evidence that “on this particular occasion, the Defendant acted in accordance with that alleged character trait, if any.” Immediately after the admission of the pen packets, both sides rested. The jury charge included a similar limiting instruction for the jury stating:

[The extraneous offense] evidence was admitted only for the purpose of assisting you, if it does, for the purpose of showing the defendant’s motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident, if any. You cannot consider the testimony unless you find and believe beyond a reasonable doubt that the Defendant committed these acts, if any, were committed.

B. Standard of Review

We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). A trial court abuses its discretion only if its decision is “so clearly wrong as to lie outside the zone within which reasonable people might disagree.” *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008). The erroneous admission of extraneous offense evidence constitutes non-constitutional error. *Hernandez v. State*, 176 S.W.3d 821, 824 (Tex. Crim. App. 2005); see also Tex. R. App. P. 44.2(b). Under rule 44.2, we must disregard “any [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights.” Tex. R. App. P. 44.2. We will uphold a trial court’s evidentiary ruling if it was correct on any theory of law applicable to the case. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

C. Applicable Law

“Relevant evidence is generally admissible, irrelevant evidence is not.” *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018) (citing Tex. R. Evid. 402). “Evidence is relevant if: (a) it has a tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Tex. R. Evid. 401. “Evidence does not need to prove or disprove a particular fact by itself to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving a fact of consequence.” *Gonzalez*, 544 S.W.3d at 370. “A ‘fact of consequence’ includes either an elemental fact or

an evidentiary fact from which an elemental fact can be inferred.” *Henley v. State*, 493 S.W.3d 77, 84 (Tex. Crim. App. 2016).

Evidence of other crimes may be admissible to show “proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” Tex. R. Evid. 404(b). It is not admissible to prove the “character of a person in order to show that he acted in conformity therewith.” *Id.* Before extraneous offense evidence can be admitted, it must also satisfy the balancing test established in Rule of Evidence 403, which states that evidence is admissible if and only if its probative value is not substantially outweighed by its unfair prejudicial effect. Tex. R. Evid. 403; see *Gigliobianco v. State*, 210 S.W.3d 637, 640 (Tex. Crim. App. 2006); *Montgomery v. State*, 810 S.W.2d 372, 388 (Tex. Crim. App. 1990).

When conducting a Rule 403 analysis, a court must balance the probative force of and the proponent’s need for the evidence against the risk of unfair prejudicial effect. *Gonzalez*, 544 S.W.3d at 372. Specifically, the court must consider (1) any tendency of the evidence to suggest decision on an improper basis; (2) any tendency of the evidence to confuse or distract the jury from the main issues; (3) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence; and (4) the likelihood that the presentation of the evidence will amount to undue delay. *Gigliobianco*, 210 S.W.3d at 641–42. The probative force of the evidence refers to how strongly it serves to make the existence of a fact of consequence more or less probable. *Gonzalez*, 544 S.W.3d at 372. We will uphold a trial court’s ruling on a Rule 403 balancing test, whether explicit or implied, if it is within the “zone of reasonable disagreement.” *Jabari v. State*, 273 S.W.3d 745, 753 (Tex. App.—Houston [1st Dist.] 2008, no pet.); see also *Martinez*, 327 S.W.3d at 736 (when reviewing the trial court’s determination of probative and prejudicial value of evidence under Rule 403, appellate courts reverse only upon showing of clear abuse of discretion).

D. Admissibility of pen packets

*5 Preliminarily, to the extent the State sought to rebut Moreno’s testimony that Lynch would not have approved of her use of cocaine, the extraneous offenses were improper evidence to do so. The Texas Court of Criminal Appeals has explained that when a witness presents a picture that an accused is not the type of person to commit

a certain type of offense, the State “may impeach that witness’ testimony by cross-examining the witness concerning similar extraneous offenses.” *Wheeler v. State*, 67 S.W.3d 879, 885 (Tex. Crim. App. 2002). However, “[t]he evidentiary caveat ... is that the opponent must correct the ‘false impression’ through cross-examination of the witness who left the false impression, *not* by calling other witnesses to correct the false impression.” *Id.* The State did not introduce the offenses as impeachment during Moreno’s testimony. Instead, the State sought to introduce additional evidence after Moreno’s testimony of prior bad acts. Even assuming that Lynch left a false impression with the jury by eliciting testimony from Moreno that he was not the type of person to possess cocaine, the State would only have been “entitled to rebut that ‘false impression’ inference with cross-examination questions [of Lynch’s witness] concerning allegations of similar misconduct.” *Id.* at 885–86. Here, however, the State did not attempt to correct any false impression by cross-examination of Moreno. Rather, the State attempted to correct the false impression through evidence, without testimony, of Lynch’s other crimes.

Even assuming the extraneous offense pen packets were relevant for some other purpose, the trial court erred in admitting them because their probative value is substantially outweighed by a danger of unfair prejudice and confusing the issues. *Tex. R. Evid.* 403. The probative value of this particular evidence was low. *Gigliobianco*, 210 S.W.3d at 641 (Rule 403 analysis must balance inherent probative force against prejudicial tendencies). The pen packets containing the two convictions showed only that on two previous occasions in 2006 Lynch had been convicted of possession with intent to deliver cocaine and was sentenced to imprisonment. Remoteness and similarity are important factors for judging the probative value of offered extraneous offenses. *Plante v. State*, 692 S.W.2d 487, 491 (Tex. Crim. App. 1985) (stating if there are sufficient common distinguishing characteristics between the extraneous offense and the primary offense such that the probative value of the evidence outweighs its prejudicial value, then the court may admit the evidence to prove certain elements of the crime). But here, the State did not introduce any associated testimony or details to demonstrate similarity between the circumstances of the prior convictions and the facts of the alleged offense. According to the pen packets, the two extraneous offenses occurred in 2004 and 2006, not near the time of the 2017 events recounted at trial. The record does not include whether the convictions occurred under circumstances similar to the State’s theory in this case.

The Court of Criminal Appeals has recognized that:

“[T]here will always be similarities in the commission of the same type of crime. That is, any case of robbery by firearms is quite likely to have been committed in much the same way as any other. What must be shown to make the evidence of the extraneous crime admissible is something that sets it apart from its class or type of crime in general, and marks it distinctively in the same manner as the principal crime.

Ford v. State, 484 S.W.2d 727, 730 (Tex. Crim. App. 1972); *see also Smith v. State*, 420 S.W.3d 207, 220–22 (Tex. App.—Houston [1st Dist.] 2013, *pet. ref’d*) (upholding admission of evidence of robbery “substantially similar” to the charged offense to prove intent to commit robbery when both incidents involved same accomplice and defendant approaching unsuspecting person in a parking lot, and incidents occurred within three weeks of each other); *Prince v. State*, 192 S.W.3d 49, 54–5 (Tex. App.—Houston [14th Dist.] 2006, *pet. ref’d*) (upholding admission of evidence of two “sufficiently similar” extraneous offenses to prove intent when the offenses were committed with a blunt instrument or knife, no property was taken from store clerk, and defendant drove away quickly); *Johnson v. State*, 932 S.W.2d 296, 302–03 (Tex. App.—Austin 1996, *pet. ref’d*) (upholding admission of extraneous aggravated assault to prove intent because both offenses involved defendant shooting at individuals in car early in morning while accompanied by same person, who also used shotgun, and attempts to prevent escape of other individuals).

*6 There is no evidence that Lynch used the same means to possess the drugs or that he possessed a similar amount. *Cf. Blackwell v. State*, 193 S.W.3d 1, 14 (Tex. App.—Houston [1st Dist.] 2006, *pet. ref’d*) (extraneous offenses introduced for purposes of proving intent were similar because they showed defendant used same means to entice young boys to be alone with him, gave them gifts, took them to same place, told them to take their clothes off, threatened them in similar ways, and only differences were the type of sexual contact); *see also Plante*, 692 S.W.2d at 493–94 (extraneous transactions were similar to charged offense of theft by deception because all involved sale of goods or services on credit induced by appellant’s unfulfilled promise to pay later, were billed to same company, and were not returned).

To the extent the evidence proved intent, it did so by suggesting that Lynch necessarily intended to commit the charged offense because he was a person who commits possession with intent to deliver in general, and therefore was more likely to have possessed cocaine on the date in question. *But see Tex. R. Evid.* 404(b)(1) (evidence of a crime is not admissible to prove a person’s character in order to show that on a particular occasion the person

acted in accordance with the character); *see also* [Gigliobianco](#), 210 S.W.3d at 641 (court must balance tendency of evidence to suggest decision on an improper basis); [Webb v. State](#), 36 S.W.3d 164, 181 (Tex. App.—Houston [14th Dist.] 2000, pet. ref’d) (“In other words, proof of the sexual assault against Porter served no probative function other than to show appellant as a person who commits sexual assault in general, and therefore was more likely to have committed the sexual assault against Baird, an inference [rule 404\(b\)](#) strictly forbids.”).

In contrast to the low probative value, the risk of unfair prejudice was very high, with a risk that the jury would decide on an improper basis. [Gigliobianco](#), 210 S.W.3d at 641. This [Gigliobianco](#) factor weighs heavily against the admission of the extraneous offenses. *Id.* The purpose of [Rule 404\(b\)](#) is to protect a defendant from the “undue prejudice” that “when evidence is received that accused is of a wicked or criminal disposition, juries are likely to find him guilty of the offense charged regardless of whether it is proved by the evidence.” [Robbins v. State](#), 88 S.W.3d 256, 263 (Tex. Crim. App. 2002) (quoting 2 Ray and Young, *Texas Law of Evidence* (2d ed., 1956), § 1492). Evidence of other crimes may create unfair prejudice if a jury would be more likely to draw an impermissible character conformity inference than the permissible inference for which the evidence is relevant or if the evidence otherwise distracts the jury and invites them to convict on a moral or emotional basis rather than as a reasoned response to the relevant evidence. [Hankton v. State](#), 23 S.W.3d 540, 547 (Tex. App.—Houston [1st Dist.] 2000, pet. ref’d).

While all extraneous offenses are inherently prejudicial, the admission of pen packets stating only the two convictions, standing alone and without context, is unusually prejudicial. In this case, the jury could have decided that the evidence demonstrating that the drugs belonged to Lynch rather than Moreno was equivocal. The jury did not hear evidence that police had observed Lynch distributing drugs during their surveillance of his home. There was no evidence of trash pulls or controlled buys. The only evidence introduced to support the inference that the drugs belonged to Lynch was that he lived in the house and had been surveilled generally by the La Marque Police Department, and drugs were found on his dresser and his cell phone. But the jury also heard from Moreno that the drugs were hers. The jury heard evidence that she had access to the bedroom where the drugs were found. And Sergeant Gandy admitted that drug paraphernalia found in the house was moved prior to being photographed, casting doubt on the exact locations of the drugs, knife, and baggies when officers arrived.

*7 Given the state of the evidence, the State’s introduction of the two convictions had significant potential “to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” [Old Chief v. United States](#), 519 U.S. 172, 180, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). The convictions allowed the jury to believe Lynch was a criminal in general, and therefore, probably committed the charged offense, a conclusion the State emphasized in closing argument, stating:

The reason why I entered [the extraneous offense convictions] was because Ms. Moreno gets on the stand and pretty much says ‘Hey, I ran this whole operation under his nose. He had no knowledge, no intent. He wouldn’t go for that. Pretty much, he’s a saint. He doesn’t want any of that in his house.’ So to rebut that, I brought you: Well he’s not above having cocaine in his possession; and in fact, cocaine, with possession and the intent to deliver. The same exact reason why we’re here today.

In addition to allowing the jury to decide on an improper basis that Lynch was a criminal in general, the evidence also had the tendency to confuse or distract the jury by allowing them to focus more acutely on Lynch’s criminal history than the evidence and main issues of the underlying case. *See* [Gigliobianco](#), 210 S.W.3d at 641.

The prejudicial effect can be reduced by the trial court’s limiting instructions, but the instruction did not do so. The State argued that it sought to admit the evidence to rebut a defensive theory and show absence of mistake, but the jury charge allowed the jury to consider the offenses for a broad range of purposes. The jury charge stated:

[The extraneous offense] evidence was admitted only for the purpose of assisting you, if it does, for the purpose of showing the defendant’s **motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident**, if any. You cannot consider the testimony unless you find and believe beyond a reasonable doubt that the Defendant committed these acts, if any[] were committed. (emphasis added).

While the potential inference of character conformity can be held in check by a limiting instruction, this limiting instruction allowed the jury to use the extraneous offense information for more reasons than those for which the State sought to admit it. *See* [McGregor v. State](#), 394 S.W.3d 90, 121 (Tex. App.—Houston [1st Dist.] 2012, pet. ref’d) (holding limiting instruction reduced risk of inference of character conformity). The laundry list of reasons to use the extraneous offenses given in the limiting instructions could have only served to confuse

the jury. See *Gigliobianco*, 210 S.W.3d at 641; *DeLeon v. State*, 77 S.W.3d 300, 316 (Tex. App.—Austin 2001, pet. ref'd). The instruction did not lessen the potential for unfair prejudice in this case. Cf. *Le v. State*, 479 S.W.3d 462, 472 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). When combined with the State's closing argument, the risk for unfair prejudice was high.

The jury did not hear evidence that would demonstrate that the circumstances of the previous convictions were similar or related to the circumstances of the underlying case, and the jury did not receive a limited instruction for using the convictions. The second factor and third *Gigliobianco* factors weigh against admissibility of the evidence. See *Gigliobianco*, 210 S.W.3d at 641.

The fourth factor, the likelihood that the presentation of the evidence amounts to undue delay, weighs in favor of admitting the evidence. *Id.* at 642. Since the State only admitted documents, rather than testimony of the convictions, it did not take long to introduce to the jury.

*8 Balancing the prejudicial nature of the offenses with the State's need for the evidence to prove intent weighs against the admission of the extraneous offense evidence. *Id.* at 641 (court must balance probative force and State's need for evidence against prejudicial effect). Intent may be inferred from circumstantial evidence. *Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996). To the extent the State sought to rebut Moreno, we have explained how the convictions were improper evidence to do so. Introducing the convictions, without details that would give the jury perspective as to whether they were similar to this situation or not, served little purpose other than to prove character conformity. See *Montgomery*, 810 S.W.2d at 391 ("The trial judge must conclude that the evidence tends in logic and common experience to serve some purpose other than character conformity to make the existence of a fact of consequence more or less probable than it would be without the evidence.").

Because the extraneous offense evidence consisted only of convictions in the form of pen packets, without additional evidence to guide the jury to conclude that the circumstances of the convictions were similar to the alleged conduct, the probative value of the extraneous offense evidence was so substantially outweighed by the danger of unfair prejudice that it was a clear abuse of discretion to admit them. See *Jabari*, 273 S.W.3d at 753; *Martinez*, 327 S.W.3d at 736.

E. Harm Analysis

Next, we must determine whether the error is reversible. When considering a non-constitutional error, we must disregard the error unless it affects a substantial right. Tex. R. App. P. 44.2(b). An error affects a defendant's substantial rights only when the error had a substantial and injurious effect or influence on the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997); *Robinson v. State*, 236 S.W.3d 260, 269 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). If the error had only a slight influence on the verdict, the error is harmless. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). Important factors include the nature of the evidence supporting the verdict, the character of the alleged error, and how the error might be considered in connection with other evidence in the case. *Bagheri v. State*, 119 S.W.3d 755, 763 (Tex. Crim. App. 2003); *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). "Specifically, the reviewing court should consider whether the State emphasized the error, whether the erroneously admitted evidence was cumulative, and whether it was elicited from an expert." *Motilla*, 78 S.W.3d at 357.

The United States Supreme Court has explained:

[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); see *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (adopting test from and citing *Kotteakos*, 328 U.S. at 764–65, 66 S.Ct. 1239); see also *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). The U.S. Supreme Court has defined "grave doubt" to mean "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995); *Webb v. State*, 36 S.W.3d 164, 182–83 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (quoting *O'Neal*, 513 U.S. at 435, 115 S.Ct. 992). If the reviewing court is unsure whether the error affected the outcome, the court should treat the error as harmful, i.e., as having a substantial and injurious effect or influence in determining the jury's verdict. *O'Neal*, 513 U.S. at 435, 115 S.Ct. 992; *Webb*, 36 S.W.3d at 182–83.

*9 The defendant is not required to prove harm from an error. *Johnson*, 43 S.W.3d at 4. Indeed, there ordinarily is no way to prove “actual” harm. *Id.* It is instead the duty of the reviewing court to assess harm from the context of the error. *Id.* The proper inquiry is whether the trial court’s error in allowing the State to introduce pen packets with Lynch’s extraneous offenses substantially swayed or influenced the jury’s verdict, or whether we are left in grave doubt as to whether the extraneous offense evidence substantially swayed or influenced the jury’s verdict. *Kotteakos*, 328 U.S. at 765, 66 S.Ct. 1239; *Johnson*, 43 S.W.3d at 4. In making this determination, we consider the trial court’s erroneous admission of the extraneous offense in the context of the entire record, and not just whether there was sufficient or overwhelming evidence of the defendant’s guilt. *Motilla*, 78 S.W.3d at 355–56.

Here, the extraneous offense evidence undoubtedly swayed the jury’s decision. We have previously explained how the character of the erroneously admitted evidence was especially prejudicial. The pen packets were official documents, leaving little room for interpretation by the jury. The strongest piece of evidence the State had against Lynch was that he had previously been convicted under similar statutes on two occasions.

The State emphasized the erroneously admitted evidence in its closing argument, referencing the prior convictions and stating that Lynch had been convicted of being a drug dealer in the past and that is the “same exact reason why we are here today.” The State’s argument gave the jury the impression they could convict Lynch of being a drug dealer, generally. The laundry list of reasons to use the extraneous offenses given in the limiting instructions could have only served to confuse the jury. *DeLeon v. State*, 77 S.W.3d 300, 316 (Tex. App.—Austin 2001, pet. ref’d).

Extraneous offense evidence can have a devastating impact on the jury’s rational disposition towards other evidence because of the jury’s natural inclination to infer guilt to the charged offense from the extraneous offenses. See *Abdnor v. State*, 871 S.W.2d 726, 738 (Tex. Crim. App. 1994); *Mayes v. State*, 816 S.W.2d 79, 86 (Tex. Crim. App. 1991). Given that the extraneous offense evidence was inherently prejudicial and possessed low probative value, and considering the record as a whole and the State’s emphasis on the extraneous offense in closing argument, it appears the offenses were presented to improperly bolster the State’s case. We cannot say with fair assurance that the erroneous admission of the offenses had only a slight influence on the jury or that their admission did not affect Lynch’s substantial rights. *Tex. R. App. P.* 44.2(b); *Johnson*, 967 S.W.2d at 417. Accordingly, we hold that the erroneous admission of the extraneous offenses resulted in reversible error.

Lynch’s two issues related to the extraneous offenses are sustained. Consequently, we need not reach his remaining issues. *Tex. R. App. P.* 47.1.

Conclusion

We reverse the judgment of the trial court and remand for further proceedings.

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--- S.W.3d ----, 2020 WL 6038042

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